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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD DIXON,

Defendant and Appellant.

A096729

(Alameda County
Super. Ct. No. 97952/H30707)

Edward Dixon pleaded guilty to possessing cocaine in jail in violation of Penal Code section 4573.6 and was placed on probation for a period of five years. Over Dixon's objection, the trial court imposed the following conditions on his probation: that he register as a drug offender under section 11590 of the Health and Safety Code;¹ that he pay a \$50 criminal laboratory analysis fee under section 11372.5, and that he pay a \$100 drug program fee under section 11372.7. He now renews his argument that the trial court should not have imposed probationary conditions that are authorized only for individuals convicted of certain Health and Safety Code drug offenses. We affirm.

Facts

While in jail for parole violation on a prior conviction for the violation of section 11352, Dixon was found in possession of a substance that later tested positive for the presence of "PCP, 'Rock' Cocaine Base." He was charged with one felony count of

¹ All further unspecified statutory references are to the Health and Safety Code.

possession of cocaine in jail under Penal Code section 4573.6.² As part of a negotiated disposition, he pleaded guilty to the charge in return for a probationary term and credit for time already served.

Before sentencing, the probation department filed a report, noting that Dixon was “subject to the standard fines and/or fees for this offense.” The probation officer recommended that any probationary term be subject to the following pertinent conditions: that Dixon pay a \$50 criminal laboratory analysis fee under Section 11372.5³ and a \$100 drug program fee under Section 11372.7⁴; and that he register under section 11590.⁵

At sentencing, the trial court indicated it intended to impose the agreed-to five-year probationary term. Dixon opposed the imposition of the recommended conditions under the Health and Safety Code because he was convicted of a Penal Code offense that was not enumerated in the Health and Safety Code provisions. The People contended

² Penal Code section 4573.6 provides in relevant part: “Any person who knowingly has in his or her possession in any . . . county . . . jail, . . . any controlled substances, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code, . . . is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years. [¶] The prohibitions and sanctions addressed in this section shall be clearly and prominently posted outside of, and at the entrance to, the grounds of all detention facilities under the jurisdiction of, or operated by, the state or any city, county, or city and county.”

³ Section 11372.5, subdivision (a), provides in pertinent part that “[e]very person who is convicted of a violation of Section 11350, 11351, 11351.5, 11352, 11355, 11358, 11359, 11361, 11363, 11364, 11368, 11375, 11377, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, 11382, 11383, 11390, 11391, or 11550 or subdivision (a) or (c) of Section 11357, or subdivision (a) of Section 11360 of this [Health and Safety] code, or Section 4230 of the Business and Professions Code shall pay a criminal laboratory analysis fee in the amount of . . . \$50 for each separate offense.”

⁴ Section 11372.7, subdivisions (a) and (b), provide in pertinent part that each person who is convicted of a violation of sections 11350 through 11392 shall pay, if financially able, a drug program fee in an amount not to exceed \$150 for each separate offense.

⁵ Section 11590, subdivision (a), provides in pertinent part that “any person who is convicted in the State of California of any offense defined in Section 11350, 11351, 11351.5, 11352, 11353, 11353.5, 11353.7, 11354, 11355, 11357, 11358, 11360, 11361, 11363, 11366, 11366.5, 11366.6, 11368, 11370.1, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, 11383, or 11550, or subdivision (a) of Section 11377 . . . shall within 30 days of his or her coming into any county or city, or city and county in which he or she resides or is temporarily domiciled for that length of time, register with the chief of police . . . or the sheriff.”

that because the Penal Code violation involved the possession of cocaine, the trial court had the discretionary power to impose the challenged fees and registration requirement as conditions of probation that were reasonably related to the offense. The prosecutor also pointed out that Dixon was already required to register as a drug offender because of his prior conviction under section 11352. The trial court imposed the challenged conditions. This timely appeal ensued.

Discussion

“In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1. [Citations.] ‘The court may impose and require . . . [such] reasonable conditions[] as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer.’ (Pen. Code, § 1203.1, subd. (j).) The trial court’s discretion, although broad, nevertheless is not without limits: a condition of probation must serve a purpose specified in the statute.” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121.) That is, a condition of probation will be upheld only if it “(1) . . . relate[s] to the crime of which the defendant was convicted, *or* (2) relate[s] to conduct that is criminal, *or* (3) require[s] or forbid[s] conduct that is reasonably related to future criminality.” (*People v. Bauer* (1989) 211 Cal.App.3d 937, 942; see also *People v. Lent* (1975) 15 Cal.3d 481, 486.)

Dixon does not argue that the conditions of probation regarding registration and the payment of the fees under the Health and Safety Code were not reasonably related to the offense of which he was convicted. Such conditions are required to be imposed on any person convicted of possession of cocaine under section 11350. (§§ 11372.5, subd. (a), 11372.7, subd. (a), 11590, subd. (a).) Because possession of cocaine is an element of the crime of possessing cocaine in prison under section 4573.6 of the Penal Code, it cannot be said that such conditions are not reasonably related to the Penal Code offense. Dixon argues, however, that the challenged conditions are not statutorily authorized

because such requirements attach only to a conviction where the defendant is charged with violating specific provisions of the Health and Safety Code. Relying on *People v. Brun* (1989) 212 Cal.App.3d 951 (*Brun*), Dixon asserts that where the Legislature has enumerated the offenses to be covered by a statute, the classifications are exclusive and the trial court cannot require defendants convicted of offenses not listed in the statute to comply with those provisions, even under their general discretionary power to impose reasonable conditions of probation under Penal Code section 1203.1.

In *Brun*, the defendant pleaded no contest to possessing methamphetamine for sale in violation of section 11378. (212 Cal.App.3d at p. 952.) He was placed on probation with the condition that he register under section 11590, even though at that time a conviction under section 11378 was not a listed offense.⁶ (*Id.* at p. 953.) Despite the defendant's acceptance of the condition of probation, the Court of Appeal struck the registration requirement on the ground that "its imposition exceed[ed] the statutory authority of the trial court." (*Id.* at p. 954.) Applying the "long-standing rule of statutory construction that the expression of certain things in a statute necessarily involves exclusion of other things not expressed," the court stated: "In section 11590 the Legislature has expressed an intent to differentiate between different drug-related crimes and to require registration only for designated ones. Had the Legislature intended to require all drug offenders to register, it could have drafted the statute to accomplish that purpose. The sentencing court is therefore not free to impose registration under section 11590 for convictions of crimes not listed in the statute. If it were otherwise, every sentencing court could nullify the Legislature's decision to treat convictions for different

⁶ At the time *Brun*, *supra*, 212 Cal.App.3d 951 was decided, registration was not required for defendants convicted of any offense involving controlled substances formerly classified as restricted dangerous drugs, such as methamphetamine. (Former § 11590, as amended Stats. 1988, ch. 245, § 1, p. 885.) Shortly after *Brun* was decided, the Legislature amended section 11590 by expressly extending the required registration to persons convicted of offenses involving the possession of methamphetamine for sale under section 11378. (Stats. 1989, ch. 1098, § 1, pp. 3924-3925, eff. Jan. 1, 1990.) Subsequently, required registration was extended to persons convicted of offenses involving the possession of methamphetamine. (Stats. 1990, ch. 1417, § 2, pp. 6435-6436, eff. Sept. 27, 1990.)

crimes in a different manner. [¶] . . . [¶] . . . The trial court could not subject defendant to these specific statutory obligations and disabilities [under section 11590] where the Legislature, by its omission of defendant’s crime from section 11590, has manifested an intent that registration is not required.” (*Id.* at pp. 954-955.)

Brun is factually distinguishable from the present case. In *Brun*, possession of the substance that the defendant was placed on probation for possessing with the intent to sell was not a listed offense for which registration could be required under section 11590. At the time in question, neither possession of methamphetamine nor possession of methamphetamine for sale was an offense subject to registration.⁷ Quite understandably, therefore, the court concluded that the Legislature had not intended to require registration for possessing for sale a controlled substance that was entirely outside of the registration scheme. (212 Cal.App.3d at p. 955.) Here, possession of cocaine, an element of the charged offense, is an offense listed in the pertinent Health and Safety Code provisions. (§§ 11372.5, subd. (a), 11372.7, subd. (a), 11590, subd. (a).) By pleading guilty to possession of cocaine in jail, Dixon necessarily admitted having committed the lesser included offense of possessing cocaine, which is an offense subject to the registration requirement.⁸

Moreover, we question the premise on which the *Brun* decision was based. “[T]he maxim of statutory interpretation *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another) . . . [¶] . . . has ‘no magical incantation, nor does it refer to an immutable rule. Like all such guidelines, it has many exceptions More in

⁷ See footnote 6, *ante*, page 4.

⁸ This case is also distinguishable from *People v. Saunders* (1991) 232 Cal.App.3d 1592 (*Saunders*). In that case, the reviewing court noted that the registrable offense under Penal Code section 290, the analogous sex offender registration statute, was a lesser offense of the crime for which the defendant was convicted. (*Id.* at pp. 1594, 1598.) However, the *Saunders* court felt “compelled” to strike the registration requirement because the registration statute had been amended to explicitly exclude the greater offense. (*Id.* at pp. 1597-1598.) Additionally, the issue in *Saunders* was whether registration was mandatory and not whether the trial court had the discretion to include registration as a condition of probation. (*Id.* at pp. 1594, 1598.)

point here . . . is the principle that such rules shall always “ ‘be subordinated to the primary rule that the intent shall prevail over the letter.’ ” [Citation.] . . . [T]he maxim has no application ‘where no manifest reason exists why other persons or things than those enumerated should not be included and thus exclusion would result in injustice.’ ” (*In re Joseph B.* (1983) 34 Cal.3d 952, 956-957.)

While sections 11372.5, 11372.7, and 11590 require persons convicted of certain drug offenses to register and pay certain fees, and sections 11372.7 and 11590 are, by their terms, inapplicable to defendants convicted of certain offenses,⁹ none of the provisions refer to, or more importantly, exclude persons convicted under section 4573.6 of the Penal Code. (Cf. *People v. Chapman* (1978) 21 Cal.3d 124, 126 [Supreme Court struck probationary condition requiring registration under section 11590, which, by its terms (subd. (c)), explicitly negates application to a misdemeanor conviction under section 11357].) Had the Legislature intended that the registration and fees not be imposed in any cases other than those enumerated, it could have said so.¹⁰ “Nothing in the statute[s] . . . suggest[] a legislative finding that in no other cases would [registration and payment of fees] be called for. Nor do[] the statute[s] purport, except in the mandated cases, to take from trial judges their traditional discretion to determine, by considering the circumstances and background of the probationer as well as the facts of

⁹ Section 11372.7, subdivision (f), provides that the section “shall not apply to any person convicted of a violation of subdivision (b) of Section 11357 of the Health and Safety Code.”

Similarly, Section 11590, subdivisions (a) and (c), provide that the section is not applicable to (1) persons convicted of an offense defined in sections 11377, 11378, 11379, or 11380, except for “offenses involving controlled substances specified in paragraph (12) of subdivision (d) of Section 11054 and paragraph (2) of subdivision (d) of Section 11055, and to analogs of these substances, as defined in Section 11401”; or (2) a conviction of an offense defined in sections 11379 or 11379.5 “if the conviction was for transporting, offering to transport, or attempting to transport a controlled substance;” or (3) “a conviction of a misdemeanor under Section 11357, 11360, or 11377.”

¹⁰ We note that the Legislature elsewhere has specifically excluded section 4573.6 of the Penal Code where it would otherwise be applicable. Section 1210.1 of the Penal Code requires the trial court to place on probation eligible persons convicted of “nonviolent drug possession offenses.” The Legislature, however, expressly excluded from the covered offenses “violations of Section 4573.6” of the Penal Code. (Pen. Code, § 1210, subd. (a).)

the offense, what conditions will best serve to reform the probationer and protect society.” (*People v. Patillo* (1992) 4 Cal.App.4th 1576, 1581 [although Pen. Code § 1001.10 mandated participation in AIDS education program only for probationers convicted of certain enumerated offenses involving intravenous use of a controlled substance, trial court did not abuse its discretion by imposing statutory requirement as probationary condition on defendant convicted of an unlisted offense of selling drugs but at risk for future intravenous drug use], disapproved on another ground in *People v. Welch* (1993) 5 Cal.4th 228, 237.) We do not deduce from the wording of the Health and Safety Code provisions at issue that the Legislature intended to preclude a trial court, in its discretion, from imposing as a condition of probation registration and payment of fees appropriate upon a conviction for the possession of cocaine merely because the possession took place in jail.¹¹

Dixon argues that registration under section 11590 is a lifetime obligation, because reregistration is required whenever the individual moves to a new city or county, so that imposition of the registration requirement impermissibly extends the period of punishment beyond the statutorily authorized limits. But the requirement at most would extend for five years beyond the termination of probation. (§ 11594.) More importantly, as we read the record here, the trial court required registration as a condition of probation only during the five-year probationary period. (Cf. *U.S. v. Lawrence* (9th Cir. Aug. 23, 2002, No. 01-50229) ___ F.3d ___ [2002 Daily Journal D.A.R. 9667].) Were Dixon to change his residence after the expiration of probation, the order entered in this case would not require him to reregister in the new city or county to which he moved. Moreover, the issue is entirely academic in this case because Dixon is already under an unexpired registration requirement as the result of his prior conviction for violating

¹¹ This appeal does not present the issue of whether upon a conviction for violating section 4573.6 of the Penal Code, a defendant is required to register under section 11590 and a trial court is mandated to impose the fees under sections 11372.5 and 11372.7. It is also unnecessary for resolution of this appeal to address whether Dixon’s failure to register would constitute not only a violation of his probation, but also a violation of section 11590, which is punishable as a misdemeanor (§ 11594).

section 11352. As the trial judge noted at the time of sentencing, “[i]t’s the same registration. You don’t register twice.” The judge indicated that he simply wanted to make clear that failure to register would be a violation of the terms of probation in this case—thus, necessarily extending only as long as the current probation continues in effect. While the willful failure to register as Dixon had previously been ordered to do would constitute a violation of his current probation in all events, certainly there was no harm in making this obligation crystal clear to Dixon by including it explicitly as a condition of the current probation.

“Probation is granted in hope of rehabilitating the defendant and must be conditioned on the realities of the situation, without all of the technical limitations determining the scope of the offense of which defendant was convicted. In determining where to draw the line between what is a reasonable and what is an unreasonable condition, common sense and reason must limit the court’s discretion. This discretion must not be disturbed unless there has been a manifest abuse.” (*People v. Miller* (1967) 256 Cal.App.2d 348, 356.) Absent provisions that specifically exclude offenses committed in violation of section 4573.6 of the Penal Code, it cannot be said that the trial court exceeded its discretionary authority in re-imposing the registration requirement and requiring payment of certain fees referred to in the Health and Safety Code as conditions of Dixon’s probation. Because there is no basis to otherwise disturb the order granting probation, we affirm.

Disposition

The order granting probation is affirmed.

Pollak, J.

We concur:

McGuinness, P. J.

Corrigan, J.